

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
REPLY BRIEF**

No. 75-4264

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner.

v.

POLLACK ELECTRIC COMPANY, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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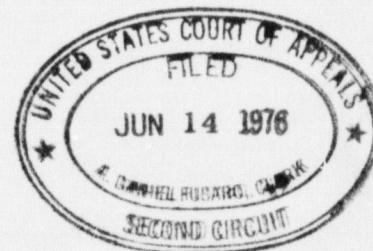
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1. The Company repeatedly uses the phrase "subject matter jurisdiction" to refer to the Board's power to hear cases. As shown in the opening brief, however, the Board's jurisdiction has two clearly defined components. The jurisdiction conferred upon it by the Act is limited only by the Commerce Clause of the Constitution (*N.L.R.B. v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963)), and thus empowers the Board to hear any case in which there is some impact on interstate commerce, so long as it is not *de minimis*. This is referred to as the

Board's statutory jurisdiction. The Board does not ordinarily exercise this jurisdiction to its fullest extent, however, and generally hears only those cases in which the employer's interstate transactions meet certain dollar-volume standards. See *Siemons Mailing Service*, 122 NLRB 81 (1958). This limited jurisdiction is termed the Board's discretionary jurisdiction, and the distinction between it and the Board's statutory jurisdiction has repeatedly been recognized by the courts. See *N.L.R.B. v. Pease Oil Co.*, 279 F.2d 135, 138 (C.A. 2, 1960), and other cases cited in the Board's opening brief, p. 16.

The Company's major contention appears to be that the Board lacks statutory jurisdiction over it. This contention is plainly wrong, however, for as we have shown in our opening brief (pp. 15-16) the Company's indirect interstate business amounts to \$21,894 annually, and this is sufficient to bring the Company within the ambit of the Board's statutory jurisdiction.

The Company also objects to the Board's failure to observe the discretionary limits to its jurisdiction in this case. However, as we have previously pointed out, the Board may disregard these limits so long as it does not do so arbitrarily or discriminatorily. See, e.g., *N.L.R.B. v. Pease Oil Co.*, 279 F.2d 135, 138 (C.A. 2, 1960). Here the Company's conduct before the New York State Labor Relations Board and its failure to object to the Board's assertion of jurisdiction over it until after the complaint had issued charging it with unfair labor practices justified the Board's asserting jurisdiction in the representation proceeding. And, contrary to the Company's contention (Br. 10-11), the principles of *res judicata* and collateral estoppel, which apply in this field of law as in others,

justified the Board's following its earlier decision in the representation proceeding. See discussion in the Board's opening brief, pp. 18-19. Further, the Board articulated in some detail in the representation proceeding its reasons for asserting jurisdiction, and clearly referred to that decision and its rationale in asserting jurisdiction herein (A. 4-5). See *N.L.R.B. v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443, n. 6 (1965). Thus, the Company's claims, and the cases cited in support of them, that the Board acted arbitrarily and discriminatorily and failed properly to specify the reasons for its decision plainly lack foundation. The Company's reliance (Br. 11) on *Seventeen-Fifty, Inc.*, 129 NLRB 1504 (1961), moreover, is misplaced. In that unfair labor practice case the Board held that it was not bound to follow its decision in an earlier representation proceeding in which the assertion of jurisdiction over an employer was based upon incorrect estimates of the company's revenues. Here the Board's decision to assert jurisdiction in the representation case was based not, as the Company asserts (Br. 11), on "erroneous data", but upon valid considerations. Thus, the Board properly followed that decision in asserting jurisdiction herein, where the same parties were involved and all of the same considerations were applicable.

2. Finally, the Company argues (Br. 11-16) that economic conditions prompted the employee discharges at issue herein. However, as shown in the Board's opening brief (pp. 12-14), the evidence that the discharges resulted at least in part from hostility to the Union is overwhelming. And, as the cases cited (Br. 14) hold, the fact that there is a legitimate basis for a discharge does not render it lawful, if it is also motivated by anti-union considerations. The cases cited by the

Company (Br. 13) do not conflict with this principle. Rather, they are cases in which union animus was found not to be a motivating factor in the discharges at issue. Thus, since such animus indisputably contributed to the discharges herein, those cases are inapposite.

CONCLUSION

For the reasons stated herein and in our opening brief, it is respectfully submitted that a judgment should be entered enforcing the Board's order in full.

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June 1976.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 11th day of June, 1976.